82-1621

No....., Misc.

IN THE

Supreme Court of the United States

October Term, 1982

KIMERLI JAYNE PRING,

Petitioner,

vs.

PENTHOUSE INTERNATIONAL, LTD., A NEW YORK CORPORATION, AND PHILIP CIOFFARI,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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QUESTIONS PRESENTED

1. Is fiction a complete defense to a libel action under the First Amendment to the United States Constitution?
2. Does the insertion of an obviously fictional segment into a writing immunize the article as a whole from libel, even though the article contains numerous defamatory and false statements of fact?
3. Is fiction a complete defense to an action for false-light invasion of privacy?
4. Does the insertion of an obviously fictional segment into a writing immunize the article as a whole from a false-light claim, even though the article contains outrageous and ridiculing false statements of fact?

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Petitioner Kimerli Jayne Pring respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on November 5, 1982. The decision of the Court of Appeals is unprecedented. It decrees fiction to be a new defense to libel and false-light invasion of privacy under the First Amendment, and, further, holds that the addition of an obviously fictional portion to a larger writing serves to immunize the article as a whole.

OPINION BELOW

The opinion of the United State Court of Appeals for the Tenth Circuit is not yet reported; it appears in the Appendix hereto at page A-1.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on November 5, 1982. The judgment reflected the decision of a sharply-divided panel of three Circuit Court judges. A timely petition for rehearing *en banc* was denied on January 12, 1983 (A-13) with four of the nine Circuit Court judges voting for rehearing. This petition for writ of certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provisions involved are the First Amendment[1] and Fourteenth Amendment[2] to the United States Constitution.

STATEMENT OF THE CASE

This case is a tort action brought by a young Wyoming woman, Miss Wyoming, against the author (Philip Cioffari) and the publisher/editor (Penthouse International, Ltd.) of a Penthouse magazine article entitled, "Miss Wyoming Saves the World...But She Blew the Contest With Her Talent". Her suit was filed in the United States District Court for the District of Wyoming on November 15, 1979. Jurisdiction was secured on the basis of diversity of citizenship. 28 U.S.C. §1332 The complaint presented

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[1]Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

[2]Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

claims for libel, false-light invasion of privacy, and outrage.

United States District Judge Clarence A. Brimmer presided over a jury trial lasting two weeks at the conclusion of which the jury returned its verdict against the defendants on all issues and on all claims for relief in the amount of $1,510,000 for compensatory damages, and $25,025,000 for punitive damages. The jury rendered a special verdict which specifically found that: 1) both defendants were guilty of negligence, recklessness, and outrage; 2) the article was reasonably understood to be about Kim Pring and to convey statements of fact about her; 3) their actions had defamed Miss Pring with actual malice; and 4) Miss Pring was a private, not a public, figure.[3]

Following an extensive review of the record by Judge Brimmer, the defendants' motion for new trial was denied, and a remittitur was ordered, reducing the award of punitive damages against Penthouse to $12,500,000. The trial judge specifically found that the remaining verdict was fair, just, and appropriate.

On appeal by the defendants to the Court of Appeals for the Tenth Circuit, the judgment was reversed solely on the basis that a portion of the article was fiction or fantasy, and, therefore, the article as a whole could not be libelous. The Penthouse story recounted the alleged sexual adventures of Miss Wyoming at the Miss America Beauty Pageant, including the charge that she publicly performed fellatio on her coach. The obvious fantasy or fictional element of this article was its additional description that the fellatio of which Miss Pring was accused caused men to levitate. Finding that levitation cannot occur from fellatio, two

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[3]The trial Court also determined that Miss Pring was a private, not a public, figure. Judge Brimmer made that ruling prior to trial, although he allowed the jury to consider the issue, too. Then, after the jury concluded that she was a private figure, Judge Brimmer again considered the issue when he overruled the defendants' motion for new trial. Having the benefit of his entire involvement with the case, and all of the evidence that had been presented, he reaffirmed his earlier ruling that Miss Pring was a private person.

members of the three judge panel ruled that the balance of the libelous article was not actionable, and thereby dismissed Miss Pring's suit in total. In so doing, the Court immunized a host of other libelous attacks in the article, not the least of which were the purported statements of fact that Miss Wyoming performed fellatio on her boyfriend in Wyoming and her coach at the Miss America Beauty Pageant. The opinion of the Court of Appeals for the Tenth Circuit found that responsibility for the irresponsible and reckless statement of fact—fellatio—could be avoided by the gratuitous addition of the fiction—levitation. Thereby, the opinion issues a license to publishers to defame any identifiable living person by falsely relating commission of any act of sexual deviation as long as that libel is then followed with some fanciful element. Simply stated, a little fiction immunizes a lot of libel.

The author of this article was Philip Cioffari, a teacher who supplemented his income by writing for publications such as Penthouse, Hustler, Chic, and Gallery. His stories were sexually explicit "formula pieces" which covered such subjects as the performance of cunnilingus with a statue of the Virgin Mary, voyeurism, sex with young girls, fellatio, and a variety of other subjects which were welcomed by the publishers. Penthouse had previously published Cioffari's "Guarding the Body of the King", a thinly-disguised short story based around the life and death of Elvis Presley. Having published that story, Penthouse announced to its readers that this "story is one in the forthcoming collection by Cioffari in which all of the stories spring from actual events in contemporary America life". (Emphasis added)

Following this announcement, Penthouse published Cioffari's article entitled, "Miss Wyoming Saves the World...But She Blew the Contest With Her Talent". It described a shallow, simple-minded Wyoming girl devoted mostly to the act of fellatio. She was a baton twirler with a beautiful body who had been a half-time performer at football games at Laramie, Wyoming. As she

was getting ready to perform at the Miss America Pageant. Miss Wyoming remembered how she discovered this "great talent" of hers—the ability to give such a "blow-job" that the recipient was actually levitated. The article, then, recounts this first experience when she performed fellatio on her boyfriend, and, she discovered, he rose from the ground:

> She drew his flesh into her, not with her mouth alone but with her entire body, the deepest, most remote parts of her uniting in common effort, calling to him, worshipping side by side with her lips and tongue and the warm tube of her throat, all of her, body and soul, crying in harmony for nourishment. Beyond the borders of his hips, her glazed eyes scaled the Tetons, pleading with the snow-tipped summit of the highest peak, for she knew not what—strength, endurance, love?—that she might lift his soul (and her own) from despair. He began to pour into her, and she thought she could feel his soul rising within him, his fountain rising at the same time so that she had to strain up on her knees to keep it in place.

But at the Miss America Pageant she performed "her talent" on her baton instead:

> While her right hand held the baton up to her mouth, her left stroked outward along the polished chrome in the direction of the judges. She had abandoned all semblance of a marching step. Instead her body swayed in a kind of interpretive dance, her shoulders rolling forward and back, her hips swiveling with slow determination as she continued the stroking motion.

Her coach chided her saying, "It looked like you were giving the damn thing a blow job". Then Miss Wyoming "in sudden inspiration" decides to display her "<u>real</u> talent" to the whole world, before a TV audience of 60 million Americans. With cameras rolling she unzips the fly of her drunken coach and commences to fellate him:

> "Shhh!" She knelt down and unzipped his fly. She wanted

> to show them that her talent was nothing to be feared, not dangerous, but beautiful and necessary.
>
> "Trust me", she whispered, * * * * and she slipped him into her mouth just as Emory Dukes announced the fourth runner-up.

And then she admits she would use this talent in the services of her country, to save the world, by giving "blow-jobs" to the enemies of the nation.

> Why do you want to be Miss America?
>
> Because I want to help the people of the world; I want to be the special ambassador of love and peace.
>
> Would you blow the entire Soviet Central Committee to prevent a Third World War? Marshall Tito? Fidel Castro?
>
> I would, I would. And in her mind she saw rising above the towering Tetons, like movie credits the words MISS WYOMING SAVES THE WORLD!

In a final comment, author Cioffari and Penthouse tell the readers what the real Miss America Pageant is about:

> Emory Dukes launched into "There She Goes" as Miss Alaska, flowers in hand, innocent smile flashed to the world, started down the runway. But the television cameras did not follow her. They remained stationary, trained down the alley where they had a head-on view of Miss Wyoming. Dreaming not of USO shows and appearances at 4H clubs but of what a Miss America should be, she knelt in service to her country with her eyes raised to Corky, his head and arms flung back in unimaginable delight, having just passed the three inch mark and still ascending.

Penthouse defended this obviously defamatory article on the basis that it was fiction and, thus, it could not have defamed Kim Pring, Miss Wyoming for 1978. The article was not announced or presented as fiction, however. Penthouse had declared to all of its readers that Cioffari's articles would "spring from actual events in contemporary American Life" (Emphasis added); the

cover of the magazine for that issue drew special attention to the article by referring to "Miss Wyoming's Unique Talent", failing to mention that it was fictitious and choosing, instead, to draw readers to an article concerning Miss Wyoming; the index did not list the article as fiction, calling it humor instead, although numerous past issues of Penthouse had characterized articles as "fiction"; the article itself was displayed without any reference as to whether it was or was not fiction.

When Kim Pring was selected as Miss Wyoming for 1978, it was a culminating achievement in her life. Born with a club foot, she had overcome the obstacles of that disability: after numerous surgeries it was apparent that she would not engage in dancing or other activities to develop grace and confidence; she found, however, that baton twirling was perfect for her. She was a hard and determined worker, practicing four and five hours a day for many years. Coaches encouraged her. She entered competitions and began winning. She was a high school majorette, and was for four years a majorette at the University of Wyoming in Laramie. Her perseverance was rewarded: in 1978 she achieved her young life's goal by becoming the Women's Grand National Baton Twirling Champion and was selected to represent Wyoming at the Miss America Beauty Pageant, not because of extraordinary beauty, which she did not possess, but because of her determination to excel despite her handicap.

Presenting her special talent at the Miss America Pageant was a great joy to this young woman. She performed in Atlantic City before large crowds of people—including Mr. Cioffari, the author—and became the crowd pleaser, winning honors in the talent portion of the Pageant.

She continued her reign as Miss Wyoming until July of 1979, when at about the same time the August, 1979, issue of Penthouse came to the newsstands advertising "Miss Wyoming's Unique Talent" on its cover, and inside the magazine in less than 3500 words, all that she had struggled, fought and worked for all her

life was destroyed. She had been tragically transformed before an entire nation, and before the citizens of her own state whom she had proudly represented, from the Women's Grand National Baton Twirling Champion into the world's best "blow-job" artist. She became "that Penthouse girl". "Hey, Penthouse", the men would holler across the room, and laugh. Strangers would come up and say, "Are you really as good as they say?", and proposition her. She would walk out of her house on a winter morning and find written in the snow across the back of her Volkswagen, "Give me head".

Mr. Guccione, owner and publisher of Penthouse, testified that he found the article amusing, and that it made him feel good; Cioffari, the author, said it was all coincidental. But the jury found otherwise. Rather than finding the article humorous and coincidental, the jury determined: 1) Penthouse's and Cioffari's conduct was outrageous; 2) the article was published with actual malice; and 3) a reasonable person reading the article would understand that Kim Pring was the subject of the article.

The similarities between the woman named in the article—Charlene--and Kim Pring were too substantial for the jury to believe Mr. Cioffari's and Mr. Guccione's claims of "coincidence":

- Both were described as Miss Wyoming. Throughout the article, the woman is almost exclusively referred to as "Miss Wyoming", rather than by any other name.
- Both were raised in Wyoming.
- Both were baton twirlers in the talent portion of the Pageant. Cioffari claimed he did not know that Kim Pring—the Miss Wyoming at the very pageant that he attended—was a baton twirler. She was, however, the only baton twirler in the 1978 Pageant, and the only baton twirling Miss Wyoming in the Pageant's history.
- The Pageant program distributed on the night Cioffari attended featured Kim Pring as Miss Wyoming in her baton twirling outfit.

— The Atlantic City newspapers carried a prominent news article about her entitled, "Wooing the Crowd With Her Magic Baton Routine is Kim Pring". The article contained a picture of her performing a twirling act, and described her balancing "a spinning baton on her back, neck, shoulders and even in her mouth".

— Penthouse described Miss Wyoming as a half-time performer at football games in Laramie, Wyoming. Kim Pring was a half-time performer at football games in Laramie for years.

— Penthouse's Miss Wyoming was accompanied to the Pageant by an ailing aunt; Kim Pring was accompanied by an elderly friend in a wheelchair.

— The manuscript described her as being blonde and blue-eyed, as is Kim Pring.

— Cioffari clothed Miss Wyoming in a blue chiffon evening dress. Kim Pring wore a blue chiffon evening dress on the evening Cioffari says he attended the Pageant.

— Both Penthouse's Miss Wyoming and the Miss Wyoming had an older male coach.

— Penthouse's Miss Wyoming warmed up for her routine in a baby blue warm-up suit, as did Miss Pring.

— Neither the Penthouse Miss Wyoming nor Kim Pring were among the final ten contestants.

— Perhaps the most telling "coincidence" is the hub of the article itself—the suggested symbolism of the baton and her mouth. In the eyes of the actual crowd at Atlantic City, Kim's dexterity with the baton was highlighted in a very difficult, but non-sexual, "mouth-roll". This feat was described in the newspaper article mentioned earlier. To Cioffari, the very essence of his character's performance was her taking the baton into her mouth, and stroking it, as if she were "giving the damn thing a blow-

job". The drawing created by Penthouse to illustrate the article depicts Miss Wyoming with a baton to her mouth in a sexually explicit manner.

The experience for Miss Pring was devastating. Her psychiatrist likened it to countless "emotional rapes" whereby the victim has forcibly wrenched from her the pride of her most personal, private life and the integrity of a reputation that she had earned with dedication and discipline for years. Having the article appear in the context of the Penthouse issue with leering photographs of lesbian lovers and nude women with their legs spread wide, and having been held up to the nation as the incomparable "blow-job" artist, Miss Pring retreated and withdrew from others.

The experience for Penthouse was amusing—and profitable. The magazine was purchased by approximately 5 million people for a cover price of $2.50 per copy, and it was estimated that it was read by as many as 25 million people. With 5 million purchases at $2.50 per copy, Penthouse would have realized $12,500,000 for this issue alone, not even including the advertising revenues by Penthouse at the rate of $35,000 per page.

The jury considered the evidence, and ruled against the defendants. In rendering its verdict, the jury completed a special verdict form wherein they specifically found as follows:

— That the article was of and concerning Kim Pring.

— That Kim Pring was a private person and not a public figure.

— That a reasonable person reading the article would understand that Kim Pring was the person referred to therein.

— That the article was false and defamatory and that it placed her in a false-light before the public.

— That the defendants acted negligently, outrageously, and with actual malice.

— That the article would be understood by a reasonable person to convey statements of fact about Kim Pring.

The Tenth Circuit Court of Appeals reversed the trial court's judgment with directions to set aside the jury's verdict and to dismiss the action. The two members comprising the panel's majority held that the "charged portions of the story described something physically impossible in an impossible setting...It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged were impossible. The setting was impossible...The descriptions were 'no more than rhetorical hyperbole.' Here, they were obviously a complete fantasy." (A-8)

The opinion is accurate in finding that fellatio will not cause one to levitate. However, the gratuitous addition of levitation cannot serve to excuse or immunize the charged conduct that gives rise to the levitation; i.e., the fellatio itself. The article is replete with defamatory statements that are in no way impossible, fictional, or products of sheer fantasy. Miss Wyoming is accused of performing fellatio with her boyfriend in Wyoming, with performing public fellatio on her coach at the Pageant, with fantasizing about having oral sex with the Soviet Central Committee, and with being the type of person who would disgrace her state and her family by engaging in public sexual adventures. She is charged in the introductory picture to the article with allowing her breast to be exposed while performing with her baton in her mouth, with having fights with her coach, with sitting and drinking in bars and lounges at the Pageant in violation of the Pageant rules. She is charged with fondling the baton in her mouth in a sexually explicit way, with swearing at and tripping another contestant, and with having sexual relations with a drunken coach. She is charged with shoving her breasts into the spotlight at the Pageant as she highsteps onto center stage, with flashing her thighs while the judges watch, with moving in front of the judges so they would have a full view of her "bust", her "delicious thighs", and all her "raw flesh". All of these possible and non-fantasy charges, however, were shielded from redress by the Tenth Circuit's opin-

ion, because Penthouse had added one fictional statement within this defamatory litany.

REASON FOR GRANTING THE WRIT

The decision below conflicts with the Court's holding in Letter Carriers v. Austin, 418 U.S. 264 (1974) by transforming the "false representation of fact" test into a shield that immunizes fiction from a libel action as well as from an action based on false-light invasion of privacy. In so doing, fiction has become a new defense to libel and false-light privacy invasions, even if the fictional aspect comprises but a part of the whole article.

The court below based its reasoning on an interpretation of two decisions of this Court, but in so doing, it misinterpreted the holdings in those cases and extended them into an extreme, unanticipated, and dangerous realm, thereby creating a totally new defense to libel and false-light privacy invasions. This ruling places individuals at the mercy of any publisher who chooses the simple expedient of embellishing the vilest defamations and privacy invasions with a mere touch of obvious fiction or fantasy.

The majority opinion (A-1) concentrates its discussion on two cases decided by this Court: Greenbelt Coop. Pub. Assn. v. Bresler, 398 U.S. 6 (1970) and Letter Carriers v. Austin, 418 U.S. 264 (1974). Greenbelt concerned the newspaper coverage of a city council meeting at which some citizens characterized the negotiating position of an applicant for a zoning variance as "blackmail". The discussion was accurately reported in the local newspaper, and the applicant for the variance (Bresler) sued. This Court held that the coverage of the heated public debate was accurate, that the word blackmail in the context of that case was no more than

"rhetorical hyperbole" and a "vigorous epithet", and that the news report was protected by the First Amendment. (Id. at 13-14) Fantasy or fiction was not the issue.

Letter Carriers involved a union newspaper that singled out certain individuals to be named in its "List of Scabs". The list of accompanied by a description of the term "scab" as recounted by Jack London. This Court held that the publication was protected by the First Amendment because it did not contain a false statement of fact. "Rather than being a reckless or knowing falsehood, naming the appellees as scabs was literally and factually true." (Id. at 283) The majority in Letter Carriers acknowledged that discussion in a labor dispute could be actionable if "used in such a way as to convey false representation of fact". (Id. at 286)

Three Justices expressed their concern for the breadth of the majority opinion in Letter Carriers. Mr. Justice Powell authored a dissent which was joined by Chief Justice Burger and Mr. Justice Rehnquist. The dissenting opinion expressed concern that the majority opinion "appears to allow both unions and employers to defame individual workers with little or no risk of being held accountable for doing so..." (Id. at 291)

The Court of Appeals for the Tenth Circuit has dramatically epitomized these concerns by transforming the rule of Letter Carriers into a weapon that permits publishers of "girlie magazines" or anyone else to defame private individuals with impunity. The two panel members who comprised the majority below discussed Greenbelt and Letter Carriers, and then held that the test was "whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated". (A-6) Finding that levitation by oral sex was impossible, they dismissed the action in total:

> It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged

> were impossible. The setting was impossible...The descriptions were "no more than rhetorical hyperbole" [referring to Greenbelt]. Here, they were obviously a complete fantasy.
>
> — A-8

The majority opinion in the Court below wrenches the holdings of Greenbelt and Letter Carriers out of their proper context, and then applies the holdings in such a manner as to grant immunity to a publication if even a part of the publication cannot be deemed a "false representation of fact". Both Greenbelt and Letter Carriers involved events that this Court considered to be of particular public significance: free and accurate coverage of public debate at a city council meeting, and free and open discussion during labor negotiations. There is no similar public interest in publishing a false and defamatory article about a private person in a "girlie magazine".

Both Greenbelt and Letter Carriers were decided upon the basis that the printed statements were true: the word "blackmail" had been used during the heated public discussion, and the anti-union employees were scabs. Kim Pring, on the other hand, did not perform fellatio on her coach, did not parade in front of the judges at Atlantic City like some brazen whore, did not swear at and trip fellow contestants, and did not use her talent as a baton twirler to lure people into disgracing sexual episodes. She was, instead, a young Wyoming woman who had sought to overcome her childhood handicap by developing skill as a baton twirler; struggling for many years and having the determination to forego childhood games and play in favor of long hours of practice, she finally achieved a measure of success that was extraordinary. The girl from Wyoming transformed herself into a champion baton twirler, and was selected to represent her state at the Miss America Pageant. It was Penthouse, then, that transformed the young woman into the nation's premier "blow-job" artist. Greenbelt and Letter Carriers are used by the Tenth Circuit to approve and sanction the Penthouse transformation: the majority found it was "no more than rhetorical hyperbole" and "obviously a com-

plete fantasy" in spite of the jury's determination that the article contained defamatory, false statements of fact.

Circuit Judge Breitenstein dissented from the majority opinion below (A-9), and four of the nine members of the Court of Appeals for the Tenth Circuit voted to rehear the case (A-13). Judge Breitenstein strongly criticized the majority opinion because it misconstrued Greenbelt and Letter Carriers (A-11-12), and because the majority permitted the reference to levitation to shield the balance of the defamatory article. He correctly emphasized that while levitation is not possible, and is fictitious, fellatio is a fact. Even though this Court declared "false representations of fact" to be actionable in Letter Carriers, the Tenth Circuit has attempted to nullify that ruling in declaring that the existence of a fictional representation within an article will immunize all of the myriad false representations of fact contained in the same article. In so doing, the Tenth Circuit holds false representations of fact—which are held to be actionable by this Court—to be protected in direct contravention of this Court's declaration in Letter Carriers.

Judge Breitenstein expressed his strong disagreement with the majority decision:

> I consider levitation, dreams, and public performance as fiction. Fellatio is not. It is a physical act, a fact, not a mental idea. Fellatio has long been recognized as an act of sexual deviation or perversion. Numerous decisions place fellatio within the crime of sodomy, which civilized people throughout the world have long condemned. In Hunt v. State of Oklahoma, 10 Cir., 683 F.2d 1305, a conviction for sale of a movie "graphically depicting a woman performing fellatio" Id. at 1307, was affirmed. The statements in the Penthouse article that Miss Wyoming, identified by a jury as plaintiff Pring, engaged in acts of sexual deviation and perversion, is a defamation of character which no decision of which I am aware has placed within First Amendment protection.

> Penthouse cannot escape liability by relying on the fantasy used to embellish the fact. Penthouse did not present the article as fiction. It did not make the usual disclaimer of reference to no person living or dead. In the table of contents, the article is characterized as "Humor". Responsibility for an irresponsible and reckless statement of fact, fellatio, may not be avoided by the gratuitous addition of fantasy.
>
> — A-10

The actions of Penthouse and Cioffari in this case were condemned by the jury. In doing so, the jury made certain determinations that deserve emphasis:

1. The jury found that Kim Pring was a private person, not a public figure. The trial court made the same finding, and it is a finding with which the Tenth Circuit Court of Appeals did not disagree.

2. The jury found that the article was about Kim Pring. In the special verdict form they affirmatively held that a reasonable person reading the article "would understand that the plaintiff...was the person referred to therein".

3. The jury found that the article contained false statements of fact concerning Kim Pring. In its opinion the majority below was completely in error when it stated that the "trial court submitted to the jury only the question of identity. It refused to submit the 'reasonably understood' issue, although instructions were tendered". (A-7) To the contrary, the jury was exhaustively instructed concerning false statements of fact about Kim Pring. Examples of these instructions, as well as the specific findings on the verdict form, are as follows:

- In defining the elements of libel, the trial court instructed the jury that it had to find that the article "contained false statements of fact about the plaintiff".
- In defining reckless disregard (which the jury found by clear and convincing evidence) the trial court instructed the jury that they would have to find that "the defendants

in fact entertained serious doubts as to whether the statements would be understood by a reasonable person as conveying statements of fact about the plaintiff". (Emphasis added)

— The special verdict form reveals that the jury specifically found that the defendants "made or published a false and defamatory statement concerning the plaintiff". (Emphasis added)

— The jury specifically found by clear and convincing evidence that the defendants "had knowledge of or acted in reckless disregard of whether the published matter would be understood by a reasonable person to convey statements of fact about the plaintiff". (Emphasis added)

— The trial court's Instructions 16,[4] 17, [5] 18, [6] and 19[7] instructed the jury on these issues repeatedly, forcibly, and properly.

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[4]Instruction 16 provided as follows: "The magazine piece in issue does not name the plaintiff. In order to recover, therefore, the plaintiff must show by a preponderance of the evidence that the writing was published of and concerning her. In order to so find, you must determine that the article was intended to refer to the plaintiff and that it is reasonably probable that members of the public who read the article would understand it as referring to her. A libel may be published of an actual person by a story that is intended to deal with fictitious characters if the characters or plot bear such resemblance to actual persons and events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person. It is not enough that the readers of a story recognize one of the characters as resembling an actual person unless they reasonably believe that the character is intended to portray that person.

[5]Instruction 17 emphasized the statement of fact language from Gertz v. Welch, 418 U.S. 323 (1974): "In determining whether the passages complained of were reasonably understood as statements of fact about the Plaintiff, Kimerli Jayne Pring, you must consider the story as a whole..." [Emphasis added]

[6]Instruction 18 emphasized the statement of fact language as follows: "In determining whether the passages complained of were reasonably understood as statements of fact about the plaintiff, Kimerli Jayne Pring, you are to con-

The Tenth Circuit opinion ignores these specific jury findings, and substitutes its own judgment as to the effect of the article. It becomes mere "rhetorical hyperbole" and "complete fantasy". However, the fictional nature of levitation cannot be used to shield the abundant defamations contained in this article. It is well established that one can be defamed in the guise of fiction. Bindrim v. Mitchell, 92 Cal. App. 3d. 61, 155 Cal. Rptr. 29 (1978), cert. denied 444 U.S. 984, reh den 444 U.S. 1040 concerned the publication of a novel entitled Touching which described nude encounter sessions with a psychiatrist named Dr. Simon Hereford. A real life psychologist named Paul Bindrim brought suit, claiming that the article was depicting him in a fictional guise. The Court in Bindrim sustained the verdict against the author because people could reasonably identify the plaintiff with the fictional character.

The laws of defamation that apply to a newspaper reporter apply to the fiction writer as well. Whether one is falsely called a public fellator in the New York Times or in a writing labeled humor in Penthouse makes no difference; they both hurt just as badly. Thus, Professor Eldredge has stated in his treatise as follows:

> However, the fact that the words the plaintiff complains of appear in a story, novel, essay, play or other dramatic presentation which is intended to deal with fictitious characters does not preclude a reasonable belief by readers or audience that the plaintiff is being portrayed. [Emphasis added]
>
> — Eldredge, The Law of Defamation §10 at 53 (1978)

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sider what the statment in its plain and natural meaning and construed in its usual sense meant to the person or persons who read it..." [Emphasis added]

'Instruction 19 instructed the jury that before imposing liability, the jury had to determine that the defendants: "had knowledge of or acted in reckless disregard of whether a reasonable person reading the publicized matter would understand that the character therein portrayed was the plaintiff and the false-light in which the plaintiff would thereby be placed." [Emphasis added]

Fiction, then, presents no exception to the general law of libel. The proof is no different than that required in all cases of libel, namely that a plaintiff prove that reasonable readers would believe that the plaintiff was being portrayed. It is an issue of identification.

Defamation occurs, therefore, when an identifiable human being is held up to ridicule and scorn by a published writing. The Supreme Court in Gertz v. Welch, 418 U.S. 323 (1974) has stated that the defamation must be communicated through a statement of fact. While Gertz held that ideas are constitutionally protected, the opinion emphasized that false statements of fact are not Constitutionally protected:

> But there is no Constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust and wide-open' debate on public issues [citing case]. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality [citing case]".
>
> — Id. at 340

In discussing the libel claim in this case, the Tenth Circuit Court of Appeals acted in direct conflict with the rulings of this Court. Gertz, Letter Carriers, and other decisions of the United States Supreme Court have held that "false statements of fact" are actionable in a libel case. The Tenth Circuit, however, has turned this test against itself. As mentioned above, the jury was specifically instructed on this test, and after deliberation determined specifically in its special verdict that the article contained defamatory and false statements of fact. Thus, the article was libelous pursuant to the standards of Gertz and Letter Carriers.

But, the majority opinion below singles out the one assertion that is fanciful (i.e., the levitation) and states that levitation cannot be a fact, and then reasons that the entire libel claim should

be dismissed even though the article was found by the jury to be replete with false statements of fact—false statements of fact that Gertz and Letter Carriers have declared to be actionable. Through this reasoning, citizens are left unprotected against the most damning defamations as long as the publisher simply adds a fictional interlude within the article.

The dangers of the majority opinion below are not limited to the libel claim, however. The Tenth Circuit also dismissed the claim for false-light invasion of privacy with the following terse statement:

> It would serve no useful purpose to treat separately the 'false-light' cause of action...sought to be injected into the trial, as the same First Amendment considerations must be applied.
>
> — A-6

Having dismissed the libel claim in contravention of Gertz and Letter Carriers, the majority further exposes citizens to attacks from publishers by stripping away their right to be free from false-light invasions of privacy.

This Court has recognized false-light invasion of privacy as constituting a separate cause of action from libel. Time, Inc. v. Hill, 385 U.S. 374 (1967); Cantrell v. Forest City Publishing Co., 419 U.S. 245 (1974); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975). It has been defined by the Restatement (Second) of Torts §652 E as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false-light is subject to liability to the other for invasion of his privacy, if
>
> (a) the false-light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false-light in which the other would be placed.

This case exemplifies the importance of this separate remedy. Miss Pring was a private person living in Wyoming when Penthouse published an outrageously offensive article about her. The privacy invasion was in no degree lessened by the inclusion of the fanciful levitation. It merely extended the ridicule, made her look more outrageous, and brought greater attention to her humiliation. Rather than being an immunizing force, the element of levitation served to make the invasion more memorable, and the guffaws more resounding. The majority opinion below invites publishers to select private persons from our populace and to disgrace them, outrageously. Whether the substance of that invasion concerns factual or fictional assertions is not relevant to the false-light in which that private person is placed. See Time Inc. v. Hill, 385 U.S. 374, 384-387, and footnote 9 at 384 (1967); Burton v. Crowell Publishing Co., 82 F.2d 154 (2nd Cir. 1936); Eldredge, The Law of Defamation, §7 at 39-40 (1978). One's privacy is invaded by being subject to outrageous ridicule whether the ridicule involves false factual assertions or clearly demeaning fantasy because both create a false-light.

> The interest protected by this Section [§652 E] is the interest of the individual in not being made to appear before the public in an objectionable false-light or false position, or in other words, otherwise than he is.
>
> — Restatement (Second) of Torts, §652 E, Comment b.

The ruling by the Tenth Circuit nullifies the remedy of false-light invasion of privacy. Not only does that opinion fail to recognize the invading power of fiction, but it compounds that failure by holding that the existence of a fictional touch to the article will immunize the article as a whole. For Miss Pring—a private person—the false-light portrayal resulted from both the fictional assertion as well as the false factual assertion; both are invasive, both are outrageous, and both are ridiculing. While it would have been improper for the Tenth Circuit to have held that the charge of levitation was not a violation of this private person's right of

privacy, the danger of the ruling was intensified by its finding that the fictional assertion was a complete defense even in respect to the false factual defamations.

This court has repeatedly and clearly held that the law of defamation is different than as applied by the Court below. This Court has never said that false-light cases are judged by the same rules as are defamation cases, and it has never held that fictional embellishment immunizes either claim. To permit the Tenth Circuit's ruling to stand is to encourage publishers to utilize the fictional device as a shield against the vilest defamations and the most outrageous invasions of privacy.

It is time to reject the effort by Penthouse to wrap this conglomerate of indecencies in the fine, luxurious silks of the First Amendment. The dignity of that Amendment is tarnished by the argument itself. This Court has repeatedly emphasized that the protections it has given to publishers in New York Times v. Sullivan, 376 U.S. 254 (1964) and other cases do not grant to publishers a "license to destroy lives or careers". Curtis Publishing Co. v. Butts, 388 U.S. 130, 170 (1967). See also, Gertz v. Welch, *supra.* The opinion of the Tenth Circuit Court of Appeals grants this license to destroy the reputation of a young woman who was specifically found by judge and jury alike to be a private person by the simple expedient of embellishing the defamation and the privacy invasion with an absurdity. The Tenth Circuit's ruling directly conflicts with Letter Carriers, as well as the entire body of libel and privacy law.

Penthouse is a commercial enterprise that made huge revenues from a magazine issue. To make a portion of its money, it chose to defame and destroy a decent young woman. All of us are human beings who live and work and think with certain human attitudes. Perhaps the most important statement that can be made about this case springs from those simplest of human feelings: a simple, true, and accurate belief that "this is not right".

It was not right for Penthouse to transform Kim Pring into a hussy, to pluck her out of the Wyoming plains like some kind of

bauble they could play with in their New York corporate offices, painting her falsely with whorish and brazen colors, dangling her in front of millions of men to leer and gawk at as they flip through pages of descriptions of fellatio, intermixed with photographs of lesbian lovers who reach sexual climax with the aid of water from a garden hose. It is not right that this Court's pronouncement in Letter Carriers is turned against itself by the Tenth Circuit when it declares that a single fictional embellishment will preclude a cause of action for the myriad false representations of fact contained in the same article. It is not right that Kim Pring is used in this manner and it is not right that others in the future may be so used by Penthouse or other publications when they decide to make more money by dangling another young bauble before their readership.

It is time for common sense to prevail. If the Penthouse argument is approved and the ruling by the Tenth Circuit Court of Appeals permitted to stand, then all citizens—public figures and private, obscure people alike—will be without remedy against the vilest defamations and the most outrageous false-light invasions of privacy. Publishers will be permitted to escape liability simply by inserting an obviously fictional segment into the offensive, and otherwise actionable, article. This publishing expedient will thereby serve to immunize the article from redress, and to wrest from all citizens the rights that this Court has painstakingly decreed.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

G.L. Spence
Robert P. Schuster
SPENCE, MORIARITY & SCHUSTER
Counsel for Petitioner

APPENDIX

United States Court of Appeals, Tenth Circuit.

No. 81-1480.

Kimerli Jayne Pring, Plaintiff-Appellee, v. Penthouse International, Ltd., a New York corporation, and Philip Cioffari, Defendants-Appellants. Appeal from the United States District Court for the District of Wyoming (D.C. No. C79-351B).

Thomas B. Kelley of Cooper & Kelley, P.C., Denver, Colorado, Norman Roy Grutman of Grutman & Miller, New York, New York (Frank R. Kennedy of Cooper & Kelley, P.C., Denver, Colorado, and Carmichael, McNiff & Patton, Cheyenne, Wyoming, with them on the brief), for Defendants-Appellants.

G.L. Spence of Spence, Moriarity & Schuster, Jackson, Wyoming (Edward P. Moriarity, Robert P. Schuster, and Robert N. Williams, with him on the brief), for Plaintiff-Appellee.

R. Bruce Rich, New York, New York, filed a brief on behalf of Amicus Curiae Association of American Publishers, Inc., Lauren W. Field and Yvette Miller of Weil, Gotshal & Manges, New York, New York, of counsel.

Jack C. Landau, Sharon P. Mahoney, and Clemens P. Work, Washington, D.C., filed a brief on behalf of Amicus Curiae Reporters Committee for Freedom of the Press.

Irwin Karp, New York, New York, filed a brief on behalf of Amicus Curiae The Authors League of America, Inc.

Before SETH, Chief Judge, BREITENSTEIN and LOGAN, Circuit Judges.

SETH, Chief Judge.

This defamation case concerns an article which appeared in defendant's magazine Penthouse. It was written about a "Charlene," a Miss Wyoming at the Miss America contest and about the contest. The defendants argue that the story is a spoof of the contest, ridicule, an attempt to be humorous, "black humor," a complete fantasy which could not be taken literally.

The basic question which had to be resolved at the trial was in two parts — whether the publication was about the plaintiff, that is, whether it was of and concerning her as a matter of identity; and secondly, whether the story must reasonably be understood as describing actual facts or events about plaintiff or actual conduct of the plaintiff.

The first element, the matter of the relationship of the story to the plaintiff as a matter of identity, is well developed in the record and need not be discussed. The jury resolved the matter in Special Verdict Form #2 and its position is supported by the record. This is a matter to be determined from the story as a whole. See New York Times Co. v. Sullivan, 376 U.S. 254, and Afro-American Publishing Co. v. Jaffe, 366 F.2d 649 (D.C. Cir.).

The second element, that the story must reasonably be understood as describing actual facts about the plaintiff or her actual conduct, obviously is quite different from the first. In some opinions it is treated as part of the "of and concerning" requirement. It is really part of the basic ingredient of any defamation action; that is, a false representation of fact. In the case before us this requirement that the story must reasonably be understood to describe actual facts about the plaintiff has become the central issue.

The Supreme Court in Letter Carriers v. Austin, 418 U.S. 264, held that a false representation of fact was required, but there "no such factual representation can reasonably be inferred." Letter Carriers, of course, had the added ingredient of a labor dispute, but this does not remove the factual statement requirement. In Letter Carriers the Court stated: "Before the test of

reckless or knowing falsity can be met, there must be a false statement of fact," citing Gertz v. Robert Welch, Inc., 418 U.S. 323. This factual statement and "reasonably understood" element is described by the Supreme Court as a constitutional requirement. It is, of course, a basic part of the First Amendment-defamation interaction.

In Greenbelt Pub. Assn. v. Bresler, 398 U.S. 6, the Court considered a newspaper story which referred to the position the plaintiff had taken on matters before the city council as "blackmail." The stories the paper carried were full and accurate. The "blackmail" characterization was made by a speaker at the council meetings. Plaintiff had property the city wanted to buy and plaintiff had other property he wanted to have rezoned. Discussions with the city on both matters were proceeding concurrently. The trial court and the Maryland Court of Appeals viewed the use of the word as charging the crime of blackmail, and since the paper knew plaintiff had committed no such crime it would be held liable for the "knowing use of falsehood." As to this theory the Supreme Court said, "[W]e hold that the imposition of liability on such a basis was constitutionally impermissible — that as a matter of constitutional law, the word 'blackmail' in these circumstances was . . . not libel." The Court as a reason for its holding stated in substance that no one could take the word literally and that it referred to plaintiff's "bargaining position." The Court said:

> "No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who consider Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

> "To permit the infliction of financial liability upon the petitioners for publishing these two news articles would subvert the most fundamental meaning of a free press, protected by the First and Fourteenth Amendments." (Footnote omitted.)

See also Letter Carriers v. Austin, 418 U.S. 264.

In Letter Carriers, referred to briefly above, the publication included a list of names of persons who had not joined the union. It described them as "scabs" and provided a derogatory description of what a scab was, including "a traitor to his God, his country." The Court made the "statement of fact" requirement, and in substance held that the statements could not be taken literally and no factual representation was present. See also Myers v. Boston Magazine Co., Inc., 403 N.E.2d 376 (Mass.).

The article had its setting at a Miss America contest and described Charlene, a Miss Wyoming at the contest, who was a baton twirler. The article began with a description of Charlene with other contestants at a bar during the course of the contest. It quotes a conversation between Charlene and her coach, a man referred to as Corky. The story then switches to the contest as Charlene is about to perform her talent as a baton twirler. She is about to go on stage and her thoughts are described. She thinks of Wyoming and an incident there when she was with a football player from her school. It describes an act of fellatio whereby she causes him to levitate. The story returns to the Miss America stage where she goes on to perform her talent. She there performs a fellatio-like act on her baton which stops the orchestra. The act is concluded and the conversation between Charlene and her coach is described, and conversation with other contestants. She did not reach the finals but she says or thinks she has a "real talent." The third incident is then described. She is at the edge of the stage during the finals while the finalists are at center stage and the finals are under way. Charlene's thoughts are again described and these are how she would have answered the questions

put to the finalists had she been one. These thoughts were that she would "save the world" with her real talent with the "entire Soviet Central Committee to prevent a Third World War? Marshall Tito? Fidel Castro?" She would be the ambassador of love and peace. The article then describes an act of fellatio with her coach at the edge of the stage while the audience was applauding the new Miss America in center stage. This fellatio causes the levitation of her coach. It is described that the television cameras were not on the new Miss America but "remained" on Charlene and her coach who was then rising into the air, and the story ends.

The complaint, as amended, refers to these incidents and limits the consequences to:

> "The net effect of the aforementioned article was to create the impression throughout the United States, Wyoming and the world that the Plaintiff committed fellatio on one Monty Applewhite and also upon her coach, Corky Corcoran, in the presence of a national television audience at the Miss America Pageant. The article also creates the impression that Plaintiff committed fellatio like acts upon her baton at the Miss America contest."

Plaintiff by her amendment of her complaint to avoid answering interrogatories, as mentioned above, narrowed her cause to the three incidents and limited them to the descriptions with no general implications. This had three consequences: the trial court limited defendants as to what they could question plaintiff about — no sex history; prevented plaintiff from any use of general imputations of immorality; and caused a reliance on the particular descriptions.

The author of the article was the defendant Cioffari, a PhD who was a professor of English at a university in New Jersey.

As described, Greenbelt concerned a factual newspaper account with the word "blackmail" in that context. Here, the underlying event described was the Miss America Pageant, but it was readily apparent, with the extended description of thoughts of Charlene

and other indications, that it was all fanciful and did not purport to be a factual account. In this context there are the particular three incidents which are in themselves fantasy and present levitation as the central theme and as a device to "save the world." We have impossibility and fantasy within a fanciful story. Also of significance is the fact that some of the incidents were described as being on national television and apparently before the audience at the pageant or part of the audience. This in itself would seem to provide a sufficient signal that the story could not be taken literally, and the portions charged as defamatory could not reasonably be understood as a statement of fact. Again, as the Court said in Greenbelt: "It is simply impossible to believe that a reader who reached the word 'blackmail' in either article would not have understood exactly what was meant."

The witnesses from the community who appeared for the plaintiff all testified that the story could not possibly be about her as she would not do that. The plaintiff asserted, and the trial court concluded, that the descriptions be taken literally. The Court said in Greenbelt: "The imposition of liability on such a basis was constitutionally impermissible." The "blackmail" there and the three incidents described in the publication here concerned must be regarded in the same way. Neither is to be taken literally and neither could reasonably be considered a statement of fact.

It would serve no useful purpose to treat separately the "false-light" cause of action nor the "outrageous conduct" doctrine sought to be injected into the trial, as the same First Amendment considerations must be applied.

The test is not whether the story is or is not characterized as "fiction," "humor," or anything else in the publication, but whether the charged portions in context could be reasonably understood as describing actual facts about the plaintiff or actual events in which she participated. If it could not be so understood, the charged portions could not be taken literally. This is clearly the message in Greenbelt and Letter Carriers. The plaintiff urges

that this constitutional doctrine should apply only to public figures, but there is no such limitation and the disposition of the several cases considered above so demonstrates. The court in Bindrim v. Mitchell, 155 Cal. Rptr. 29, which is discussed by both parties, considers this issue also. See also Bucher v. Roberts, 595 P.2d 239 (Colo.); and Myers v. Boston Magazine Co., Inc., 403 N.E.2d 376 (Mass.).

The trial court submitted to the jury only the question of identity. It refused to submit the "reasonably understood" issue although instructions were tendered. The instruction given, No. 16, in part, states:

> "The magazine piece in issue does not name the Plaintiff. In order to recover, therefore, the Plaintiff must show by a preponderance of the evidence that the writing was published of and concerned her.
>
> "In order so to find, you must determine that the article was intended to refer to the Plaintiff and that it is reasonably probable that members of the public who read the article would understand it was referring to her. A libel may be published of an actual person by a story that is intended to deal with fictitious characters, if the characters or plot bear such resemblance to actual persons and events as to make it reasonable for its readers or audience to understand that a particular character is intended to portray that person."

The special verdict contains the same standards. This is as close as the trial court came to instructing on the "reasonably understood" matter and it is apparent that the instruction is only a matter of identifying the plaintiff, and has no other element. The jury found that plaintiff was the person "referred to"—it was about her.

It appears that the trial court had decided the story generally was not fiction in its ruling on the pretrial motion to dismiss, and that this disposed of the matter. The trial court thus treated the whole story as a statement of fact as the trial court did in Greenbelt.

This was error. The Supreme Court in Greenbelt, under comparable circumstances, held that to give a literal meaning to the word there concerned was "constitutionally impermissible." The Court in the circumstances before it in Greenbelt thus treated the "reasonably understood" element as a question of law: "It is simply impossible to believe that a reader . . . would not have understood exactly what was meant."

The first inclination is to hold that the issue described above should have been submitted to the jury. It is apparent that an argument can be built on the word "reasonably" as a typical element for a jury, and in some circumstances it could be a jury question. Justice White in his concurrence in Greenbelt suggests that it was there a jury question. The majority, however, regarded it as a matter of law.

All the testimony from plaintiff's lay witnesses was that it could not be about the plaintiff. An "expert" witness testified that some individuals might attach a broader subliminal meaning of sexual permissiveness, but this does not represent an applicable standard and cannot be regarded as much more than a contradiction of the testimony of her witnesses.

The charged portions of the story described something physically impossible in an impossible setting. In these circumstances we must reach the same conclusion, as did the Court in Greenbelt, that it is simply impossible to believe that a reader would not have understood that the charged portions were pure fantasy and nothing else. It is impossible to believe that anyone could understand that levitation could be accomplished by oral sex before a national television audience or anywhere else. The incidents charged were impossible. The setting was impossible.

This does not leave, on the record before us, any alternative but to decide as a matter of law, as was said in Greenbelt, "even the most careless reader must have perceived that." The descriptions were "no more than rhetorical hyperbole." Here, they were obviously a complete fantasy.

The story is a gross, unpleasant, crude, distorted attempt to ridicule the Miss America contest and contestants. It has no redeeming features whatever. There is no accounting for the vast divergence in views and ideas. However, the First Amendment was intended to cover them all. The First Amendment is not limited to ideas, statements, or positions which are accepted; which are not outrageous; which are decent and popular; which are constructive or have some redeeming element; or which do not deviate from community standards and norms; or which are within prevailing religious or moral standards. Although a story may be repugnant in the extreme to an ordinary reader, and we have encountered no difficulty in placing this story in such a category, the typical standards and doctrines under the First Amendment must nevertheless be applied. The magazine itself should not have been tried for its moral standards. Again, no matter how great its divergence may seem from prevailing standards, this does not prevent the application of the First Amendment. The First Amendment standards are not adjusted to a particular type of publication or particular subject matter.

The Supreme Court considered what it described as "vulgar magazines" in Winters v. New York, 333 U.S. 507, and held that despite all the disparate views they were within the protection of the First Amendment. The gross nature of the article here concerned makes an objective analysis of the law difficult, but we do not make a moral judgment as to this magazine, or other writings of the author, nor on the article generally as plaintiff urges by her brief.

The judgment must be reversed with directions to set aside the verdict of the jury and to dismiss the action.

IT IS SO ORDERED.

BREITENSTEIN, Circuit Judge, dissenting

The majority holds that as a matter of law this defamation action

must be dismissed because the publication was pure fantasy protected by the First Amendment. I do not agree.

On overwhelming evidence the jury found that the plaintiff Pring was the "Miss Wyoming" about whom the Penthouse article was written. The majority accept that jury finding. The question is whether Penthouse can escape liability by the claim that the article was fiction and fantasy.

The article contains both fact and fiction. The article says that Miss Wyoming performed fellatio with a male companion and caused him to levitate. In her appearance at a national Miss America contest she thought that she might save the world by similar conduct with high officials. She manipulated her baton so as to simulate fellatio. She performed fellatio with her coach in view of television cameras. I consider levitation, dreams, and public performance as fiction. Fellatio is not. It is a physical act, a fact, not a mental idea. Fellatio has long been recognized as an act of sexual deviation or perversion. Numerous decisions place fellatio within the crime of sodomy, which civilized people throughout the world have long condemned. In Hunt v. State of Oklahoma, 10 Cir., 683 F.2d 1305, a conviction for sale of a movie "graphically depicting a woman performing fellatio" Id. at 1307, was affirmed. The statements in the Penthouse article that Miss Wyoming, identified by the jury as plaintiff Pring, engaged in acts of sexual deviation and perversion, is a defamation of character which no decision of which I am aware has placed within First Amendment protection.

Penthouse cannot escape liability by relying on the fantasy used to embellish the fact. Penthouse did not present the article as fiction. It did not make the usual disclaimer of reference to no person living or dead. In the table of contents, the article is characterized as "Humor." Responsibility for an irresponsible and reckless statement of fact, fellatio, may not be avoided by the gratuitous addition of fantasy. Penthouse does not claim that the fact statement was truthful. Moral standards may have changed

since the First Amendment was adopted but that change has not gone so far as to protect a publisher which defames an identifiable living person by relating commission of an act of sexual deviation and perversion.

To justify the conclusion that the First Amendment defense presents a question of law, the majority adopt the "reasonably understood" test. To support that test reference is made to Greenbelt Pub. Assn. v. Bresler, 398 U.S. 6, and Letter Carriers Assn. v. Austin, 418 U.S. 264. Bresler involved a newspaper report of a public meeting held by a City Council. The article truthfully reported that a person present at the meeting characterized the plaintiff's negotiating position as "blackmail." In reversing a judgment for plaintiff, the Court said that the publication did not impute a crime and that even the most careless reader would perceive that the word "blackmail" was no more than a "rhetorical hyperbole, a vigorous epithet." 398 U.S. at 14.

Letter Carriers was a defamation action arising out of a labor dispute in which a union publication referred to plaintiffs as "scabs" and equated "scab" with "traitor." In reversing a judgment for plaintiffs, the Court applied law relating to labor disputes and said, 318 U.S. at 283: "Rather than being a reckless and knowing falsehood, naming the appellees as scabs was literally and factually true."

In both Greenbelt and Letter Carriers the alleged defamatory statement was true. Penthouse makes no claim that the act of fellatio by Miss Wyoming was true. The word "fellatio" was not used as a hyperbole or epithet. It was used to describe a physical act. The use of the technical Latin term rather than the vulgar vernacular does not protect Penthouse. The descriptions of the conduct of Miss Wyoming would make even the most careless reader aware of sexual deviation and perversion. The jury found that a "reasonable man" would understand that the plaintiff was the person referred to in the article, that the article was false and defamatory, and that it "unreasonably" placed the plaintiff in a

false light before the public. See Jury Verdict, R. 1500-1503.

Nothing in Greenbelt or Letter Carriers applies a "reasonably understood" test to defamation actions generally. In each of those cases the alleged defamatory statement was literally true. Here it was not.

The action of the majority in applying the "reasonably understood" test as a matter of law contravenes the Tenth Circuit decision in Lawrence v. Moss, 10 Cir., 639 F.2d 634, cert. denied 451 U.S. 1031 (1981). The Lawrence decision cites and analyzes Supreme Court cases with facts more analagous to the present case than either Greenbelt or Letter Carriers. Id. at 636-637. I stand by that analysis. Lawrence reversed a summary judgment for defendant, directed that a jury trial be held, Id. at 638-639, and said that questions of intent and malice are for the fact finder. Id. So also is the question of "reasonably understood." I recognize, as does Lawrence, that in some defamation cases brought against news media summary judgment may be proper as a screening device to prevent unnecessary harassment. Id. at 639. That principle does not apply here. The district court properly submitted the case to the jury.

The majority reject the jury verdict and order dismissal because, as a matter of law, the article is not defamatory. I disagree and, accordingly, dissent. The majority order of dismissal makes it unnecessary to consider the many other issues raised in the briefs.

NOVEMBER TERM—January 12, 1983

Before Honorable Oliver Seth, Honorable Jean S. Breitenstein, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges.

Kimerli Jayne Pring, Plaintiff-Appellee, v. Penthouse International, Ltd., a New York corporation, and Philip Cioffari, Defendants-Appellants, Association of American Publishers, Authors League of America; The Reporters Committee for Freedom of the Press, Amicus Curiae. No. 81-1480.

The Court, upon its own motion, in order to correct a clerical error in the order entered January 11, 1983, in the captioned cause, vacates that order and reissues it in its entirety to read as follows:

This matter comes on for consideration of appellee's Kimerli Jayne Pring, petition for rehearing and suggestion for rehearing in banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard. Circuit Judge Breitenstein voted to grant rehearing.

The clerk transmitted the suggestion for rehearing in banc to the members of the panel and to the judges of the court who are in regular active service. A vote was requested. The court having been polled on the suggestion for rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, rehearing in banc is denied. Circuit Judges Breitenstein, Holloway, Barrett, and Doyle voted to grant rehearing in banc.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS, Clerk